2017 IL App (1st) 141485-U

THIRD DIVISION
February 1, 2017

No. 1-14-1485

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 4599
	)	
NICHOLAS OLSEN,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's conviction for aggravated arson affirmed over his contention that the trial court erred in refusing to provide the jury with instructions on reckless conduct and criminal damage to property where reckless conduct was not a lesser-included offense of aggravated arson and no evidence supported an instruction on criminal damage to property.

¶ 2 Following a jury trial, defendant Nicholas Olsen was convicted of aggravated arson (720 ILCS 5/20-1.1(a)(1) (West 2012)) and sentenced to six years' imprisonment. On appeal,

defendant contends that the trial court erred in refusing to provide the jury with instructions on reckless conduct and criminal damage to property where they were both lesser-included offenses of aggravated arson and the evidence supported both instructions. We affirm.

¶ 3 Defendant was charged with aggravated arson, stemming from an incident on February 22, 2012, where he allegedly, during the course of committing arson by means of fire, knowingly damaged the apartment building located at 4423 North Sheridan Road and knew or reasonably should have known that one or more people were present inside.

¶ 4 At trial, Andrea Cook testified that, at around 2 a.m. on February 22, 2012, she was sleeping in her apartment located on the seventh floor of the apartment building when she was awakened by a "violent fight" in the hallway. Cook looked through her peephole and observed defendant and another man, who was trying to "settle" defendant down. Although Cook did not recognize defendant, she recognized the other man from seeing him around the apartment building. Shortly after, she observed two police officers speak to defendant and the other man. The police subsequently left.

¶ 5 About 20 minutes later, Cook heard screaming and yelling again. When she looked through her peephole, it appeared to her that the other man had locked defendant out of an apartment. While in the hallway, defendant stated "I'm going to light this mattress on fire." The mattress had been in the hallway when Cook returned home that night. She observed defendant bend down next to the mattress, but could not see his hands. Afterward, she saw "orange" flames, but acknowledged not actually seeing defendant set fire to the mattress. Defendant then stated "I lit the mattress on fire. Honey, I love you. The mattress is on fire."

¶ 6 As the flames began approaching her door, Cook screamed and heard the other man exit the apartment, break the glass to a fire extinguisher and put the fire out. The other man still

refused to allow defendant to enter the apartment. Cook heard defendant state "I'm going to light the mattress on fire again." She watched defendant reach down and heard "a blast" but acknowledged not actually knowing what caused the blast. Suddenly, black smoke rushed into her apartment and she had trouble breathing. Because the fire escape was being blocked by the mattress, Cook went to a window and stuck her head out of it. She was eventually rescued by firefighters. Although Cook spoke to the police and an assistant State's Attorney shortly after the incident, she could not remember the specifics of what she told them, explaining that she was "in a state of shock" at the time.

¶ 7 Napoleon Smith testified that he had lived on the seventh floor of the apartment building for about eight years. While living there, he spoke to defendant on occasion but never socialized with him. Early in the morning of February 22, 2012, Smith was awakened by defendant and his roommate arguing in the hallway. Smith heard the roommate tell defendant he could not "handle [his] alcohol." Eventually, the police came, spoke to the roommate and left. Smith continued to hear yelling and screaming, and defendant eventually ended up in the hallway. While there, he stated "I'm going to set the mattress on fire." After hearing this, Smith called the police and alerted them. Sensing "something was going to happen," Smith went to the bathroom and got dressed. He went into the hallway and observed a fire. He heard defendant say he started the fire with a match. After Smith escaped from the building, he saw defendant lying on top of a car outside "flailing around," saying "he killed his husband."

¶ 8 Kenny Vang and Jessica DiFiore both testified that they lived together on the seventh floor of the apartment building. Early in the morning of February 22, 2012, they heard an unfamiliar voice crying and screaming in the hallway. As a result, they called the police, who arrived and spoke to the people who lived in a nearby apartment. A short time later, after the

police left, they both heard the person who had been screaming exclaim "your house is on fire." Vang observed smoke and a red glow in the hallway through the peephole. They called the police again, urging them to come to the apartment building quickly. Suddenly, they observed black smoke pouring into their apartment from the hallway. They subsequently exited their apartment. As they were near the stairwell, DiFiore heard the man who had been screaming, who she identified at trial as defendant, say "[m]y husband is dead." Once Vang and DiFiore got outside, DiFiore saw defendant lying on the ground, again saying "[my] husband is dead."

¶ 9 Chicago firefighter James Peters testified that he responded to a call of a fire at the apartment building. When he arrived, he observed people evacuating the building and a woman on the seventh floor with her head hanging out of a window and heavy black smoke coming behind her. Peters and other firefighters subsequently entered the building and eventually reached the seventh floor via a fire escape. The door leading to the residential section of the building was locked, so the firefighters broke a window and observed the fire was just beyond the door. They began spraying water at the fire and eventually were able to open the door and fully extinguish the fire. While walking through the hallway, Peters observed a large mattress that was "burnt completely down to the steel coils" with no material left. The hallway had "smoke damage[]," and the plaster from the walls and ceiling were falling off. Because the firefighters were concerned the mattress could reignite, they removed it from the building and placed it in an alley so it could be further doused with water. They also rescued the woman from the seventh floor.

¶ 10 Karl Solms, a fire marshal with the Chicago Fire Department, investigated the fire and determined that it had originated from the common hallway of the seventh floor. From his conversations with firefighters on the scene, he learned that a mattress had been found burning in

the area where the fire started. Based on Solms' examination, he ruled out the fire's cause being electrical, from someone cooking or using a barbecue, and the "careless use of smoking materials," as there were no evidence of any cigarette remains. He also ruled out the fire being caused by the light fixtures in the hallway as there was no evidence demonstrating such a cause. Solms concluded the fire was caused as "the result of a human action" by an "open flame ignition of the fabric of a mattress" by something such as a cigarette lighter, match or candle.

¶ 11 After examining the scene, Solms spoke with Cook, who relayed to him that, after she heard her neighbors arguing in the seventh floor hallway, she heard someone say "[y]ou'd better let me back in the apartment or I'm going to set this mattress on fire." Later, she heard that same person say "I just lit the mattress on fire."

¶ 12 Chicago police detective Crow testified that she and her partner were called to the apartment building's seventh floor early that morning. As they approached the subject apartment, Crow heard men's voices crying and arguing. Crow knocked on the door and two men, including defendant, opened the door. Crow observed that defendant was "loud," "sobbing," "slurring" his speech, unsteady on his feet and "very emotional." She concluded he was "very inebriated." Defendant and the other man assured Crow and her partner that they would calm down, go to sleep and be able to coexist in the apartment together. Crow and her partner then left.

¶ 13 Several minutes later, Crow received a call that there was a fire in the apartment building and returned. Crow immediately began helping residents evacuate the building. Later, in the lobby of the building, she spoke to Cook, who told her that defendant lit the mattress on fire after she observed him through her peephole bending down by the mattress. Crow found defendant and arrested him.

¶ 14 After the State rested, the parties discussed jury instructions. Defense counsel requested an instruction on the crime of reckless conduct as a lesser-included offense of aggravated arson. The State argued that reckless conduct was not a lesser-included offense of aggravated arson. The trial court agreed with the State, but allowed defense counsel an opportunity to present case law on the issue. The court stated it would defer ruling on the issue until the following day. Defense counsel responded, requesting an instruction on criminal damage to property as a lesser-included offense of aggravated arson if the court rejected his proposed instruction on reckless conduct. After the parties argued regarding whether there was any evidence defendant acted recklessly, the court found that no evidence had been presented that the fire was caused by anything other than defendant's intentional act. It concluded that it would not "allow [an instruction on criminal damage to property] at this juncture, *** but it can b[e] revisited at the end of [defendant's] testimony."

¶ 15 In the defense's case, Brian Posluszny testified that defendant was his husband. On the evening of February 21, 2012, he and defendant had gone out drinking at a bar and returned to their apartment around 2 a.m. When they returned home, they began arguing. The police were called and talked to both of them before leaving. Shortly after the police left, they began arguing again and defendant said he wanted fresh air, which usually meant he wanted to smoke. Defendant grabbed his keys, his rolled cigarettes and left. Posluszny thought he was going to the fire escape to smoke. Posluszny began cleaning up, paying no attention to the time when he heard shouting in the hallway. He immediately recognized it was defendant and heard him pounding on their door yelling "fire, fire." Posluszny opened the front door and saw nothing but smoke. He looked down the hallway and observed a mattress, which was partially leaned against a wall in an "L shape," on fire.

¶ 16 Posluszny immediately grabbed a fire extinguisher from the hallway wall and tried to put out the fire. Barely anything came out of the extinguisher, so he ran back to his apartment and called 911. When he returned to his apartment's door, the fire had gotten bigger. Because Posluszny did not hear any fire alarms, he began shouting and pounding on other apartments' doors, trying to alert his neighbors of the fire. He helped defendant exit the building, but described him as "sleep[y]," "really out of it," "drunk and stumbling." Posluszny denied hearing defendant say he was going to light the mattress on fire or that he lit the mattress on fire. But Posluszny acknowledged he did not know how the fire began. He also denied that defendant was knocking on their apartment door trying to get inside, explaining defendant took keys when he left the apartment.

¶ 17 Defendant testified that "[t]he whole night [was] a blur" and only remembered "bits and pieces" because of his heavy drinking, which resulted in him being intoxicated. He believed he experienced a "black out." He remembered that, at around 3 a.m., he was lying down in his apartment and just wanted to sleep. The next thing he remembered was pounding on the door yelling "there's a fire." He had no recollection of starting a fire and stated he had no reason to start a fire in the hallway. He denied threatening to light the mattress on fire and saying he lit it on fire. He acknowledged knowing that his apartment building had many people living there at the time.

¶ 18 The defense further presented multiple witnesses who testified to defendant's reputation for being truthful, peaceful and law-abiding.

¶ 19 After the defense rested, the parties revisited the jury instructions. Defense counsel reminded the trial court that, on the previous day, it said he could "revisit" the lesser-included offense instructions. The court asked "you want to revisit the lesser included instruction that —."

Counsel interjected, "[n]o, a different —." The court interjected "[n]ot lesser included but that issue." Counsel then informed the court "[a] different one" and requested a lesser-included offense instruction for residential arson. After the State asserted, and the court agreed, that residential arson was not a lesser-included offense of aggravated arson, counsel requested the instruction as an alternative charge. The court responded that alternative charges were decisions made by the State, not the defense, and denied counsel's request. Counsel did not discuss his previous request for instructions on reckless conduct and criminal damage to property as lesser-included offenses.

¶ 20 During jury deliberations, the jury submitted a note to the trial court, asking: "Can aggravated arson be just arson?" The court informed the jury that it had been given the instructions of law on the charge.

¶ 21 The jury found defendant guilty of aggravated arson. Defendant unsuccessfully moved for a new trial, arguing the trial court erred in refusing to provide the jury with instructions on reckless conduct and criminal damage to property as lesser-included offenses. The court subsequently sentenced him to six years' imprisonment. This appeal followed.

¶ 22 Defendant contends that the trial court erred in refusing to provide the jury with instructions on reckless conduct and criminal damage to property where they were both lesser-included offenses of aggravated arson and there was evidence presented at trial from which the jury could have found that he acted recklessly in starting the fire rather than deliberately or knowingly. Specifically, defendant argues that, based on the testimony regarding his intoxication, passing out and leaving the apartment to get fresh air while taking cigarettes with him, there was some evidence showing he acted recklessly because he could have unintentionally dropped a lit cigarette or match on the mattress. Defendant further asserts that Fire Investigator

Solms' testimony supported an unintentional act because he concluded that the mattress was ignited by an open flame, which could have been done by a single match, and Napoleon Smith testified to hearing defendant say something about a match.

¶ 23 Initially, the State argues that defendant waived his claim of error for review because he failed to revisit the jury instructions on reckless conduct and criminal damage to property, and instead requested an instruction on residential arson, during the parties' second discussion of the instructions. The State also asserts defendant forfeited the claim of error by not objecting to the trial court's denial of the instructions during the parties' first discussion. Defendant responds, arguing he has properly preserved the claim of error for review, but even if he had not, the claim is reviewable for plain error.

¶ 24 We note that, in claiming the trial court committed error, defendant relies mostly on evidence adduced during his case-in-chief, which was presented to the court *after* he requested, and the court denied, his lesser-included instructions on reckless conduct and criminal damage to property. One cannot premise an argument of error committed by the court on evidence that was not before the court when it rendered its decision. Further, the court gave defendant the opportunity to revisit his request for the lesser-included instructions on reckless conduct and criminal damage to property after his case-in-chief, but he did not take that opportunity. Instead, he chose to pursue "[a] different one," requesting a lesser-included offense instruction on residential arson. Regardless, because, for the reasons set forth below, we have determined that defendant was not entitled to a reckless conduct or criminal damage to property instruction, we need not decide whether defendant has waived or forfeited his claim of error for review. See *People v. Jackson*, 2016 IL App (1st) 133823, ¶ 35 (where the appellate court ultimately found

the defendant was not entitled to a proposed jury instruction, an analysis of whether or not he preserved his claim of error was unnecessary).

¶ 25 Generally, a defendant may not be convicted of an uncharged offense except in instances when he is entitled to a jury instruction on an uncharged lesser-included offense. *People v. Stewart*, 406 Ill. App. 3d 518, 536 (2010). A lesser-included offense is one which "[i]s established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged." 720 ILCS 5/2-9(a) (West 2012). In determining whether an uncharged offense is a lesser-included offense of a charged offense, our courts have utilized the " 'charging instrument approach.' " *People v. Clark*, 2016 IL 118845, ¶ 31 (quoting *People v. Kennebrew*, 2013 IL 113998, ¶ 32).

¶ 26 Under this approach, "the lesser offense need not be a necessary part of the greater offense, but the facts alleged in the charging instrument must contain a broad foundation or main outline of the lesser offense." *Clark*, 2016 IL 118845, ¶ 31. The charging instrument does not have to expressly state all of the elements of the lesser offense so "long as any missing elements can be reasonably inferred from the allegations included." *Id.* However, the mere fact that an uncharged offense is a lesser-included offense of a charged offense does not automatically mean the defendant is entitled to an instruction on the lesser-included offense. *Stewart*, 406 Ill. App. 3d at 536. Rather, the defendant is entitled to the instruction if "there is *some evidence* in the record that, if believed by the jury, will reduce the crime charged to a lesser offense." (Emphasis in original.) *People v. McDonald*, 2016 IL 118882, ¶ 25. An instruction should be given to the jury regardless of the credibility of that evidence. *Id.* We review the trial court's decision of whether there was sufficient evidence to warrant a lesser-included offense instruction for an abuse of discretion. *Id.* ¶ 42.

¶ 27 We begin our analysis by determining whether reckless conduct or criminal damage to property is a lesser-included offense of aggravated arson. We find that reckless conduct is not a lesser-included offense of aggravated arson. Reckless conduct occurs when a defendant "by any means lawful or unlawful, recklessly performs an act or acts that: (1) cause bodily harm to or endanger the safety of another person" or "(2) cause great bodily harm or permanent disability or disfigurement to another person." 720 ILCS 5/12-5(a) (West 2012). In comparison, defendant was charged with aggravated arson "in that he, when in the course of committing arson, by means of fire, knowingly damaged the damaged property located at 4423 N. Sheridan Rd., Cook County, Illinois and knew or reasonably should have known that one or more persons were present therein."

¶ 28 Aggravated arson, as charged in this case, was based on defendant's damage to real property whereas reckless conduct can only be based on causing bodily harm or endangering the safety of another person. Because reckless conduct has an element not included in the aggravated arson charge, it cannot be considered a lesser-included offense of aggravated arson under these circumstances. See *People v. Cunningham*, 365 Ill. App. 3d 991, 995 (2006) (" '[T]he lesser offense cannot have any element that is not included in the greater one.' ") (quoting *People v. Hawkins*, 125 Ill. App. 3d 520, 522 (1984)). Therefore, reckless conduct is not a lesser-included offense of aggravated arson, and defendant was not entitled to such an instruction.

¶ 29 However, criminal damage to property is a lesser-included offense of aggravated arson. Relevant here, according to defendant, criminal damage to property occurs when a defendant "recklessly by means of fire or explosive damages property of another." 720 ILCS 5/21-1(1)(b) (West 2012). A person acts recklessly when he "consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute

defining the offense, and that disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation." 720 ILCS 5/4-6 (West 2012). The State does not dispute that, under these circumstances, criminal damage to property is a lesser-included offense of aggravated arson, thereby conceding it is. Our case law supports the same conclusion. See *Stewart*, 406 Ill. App. 3d at 537 (under the charging instrument approach, criminal damage to property is a lesser-included offense of aggravated arson). Therefore, criminal damage to property is a lesser-included offense of aggravated arson.

¶ 30 Having concluded that criminal damage to property is a lesser-included offense of aggravated arson, we next must decide whether there was some evidence at trial supporting the instruction. None of the evidence presented at trial provides any support for the finding that defendant acted recklessly in starting the fire. Defendant and Brian Posluszny's testimony showed that defendant was intoxicated, possibly blacking out, left his apartment to get fresh air and took cigarettes with him. However, there was no testimony that defendant actually began smoking in the hallway or dropped a lit cigarette, match or lighter while there. Similarly, merely because Fire Investigator Solms stated the fire could have been started by a match and Napoleon Smith heard defendant say he started the fire with a match does not support a finding that defendant might have acted recklessly in starting the fire. Neither Solms nor Smith saw how defendant started the fire in the hallway, thus they provide no evidence of whether defendant did so recklessly.

¶ 31 Notably, both Smith and Andrea Cook heard defendant state he was going to light the mattress on fire, demonstrating that he did not consciously disregard the risk that fire would erupt but rather intended that result. Then, after Posluszny put the fire out, Cook heard defendant again say he was going to light the mattress on fire, demonstrating his conduct in starting the fire

was anything but reckless. Furthermore, in defendant's testimony, he acknowledged not being able to remember the specifics of the night, thus providing no evidence that he acted recklessly. Consequently, the evidence presented at trial only supports the finding that defendant knowingly and deliberately set fire to the mattress. There was not "some" evidence that he acted recklessly. *McDonald*, 2016 IL 118882, ¶ 25. Defendant therefore was not entitled to a lesser-included offense instruction on criminal damage to property.

¶ 32 Defendant's reliance on *People v. Bradley*, 256 Ill. App. 3d 514 (1993), as support for his contention that there was some evidence showing he acted recklessly is unpersuasive. In *Bradley*, the defendant, who had been charged with aggravated arson, initially told the police that she might have started the fire when she dropped a cigarette on a mattress. *Id.* at 514-15. Later during questioning, she told the police she intentionally set fire to the mattress with a cigarette lighter after a fight with her boyfriend. *Id.* at 515. Defense counsel requested an instruction on criminal damage to property as a lesser-included offense of aggravated arson. *Id.* The trial court denied the request, finding there had been no evidence presented of the defendant's recklessness. *Id.* On appeal, this court held the instruction should have been given because the defendant initially claimed the fire began when she accidentally dropped a cigarette on the mattress, which could have supported a finding by the jury that she acted recklessly rather than deliberately or knowingly. *Id.* at 516. Here, unlike in *Bradley*, there was no evidence that defendant recklessly performed any action that might have started the fire, such as dropping a cigarette or a match. Rather, the evidence at trial only demonstrated that he knowingly and deliberately lit the mattress on fire.

¶ 33 We additionally note that, even if reckless conduct could be considered a lesser-included offense of aggravated arson, for the reasons stated above, there was not "some" evidence he

acted recklessly to support giving the instruction. *McDonald*, 2016 IL 118882, ¶ 25. Accordingly, the trial court did not err in refusing to give lesser-included instructions on reckless conduct or criminal damage to property.

¶ 34 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 35 Affirmed.